



Assisted Public Policing

The (in)ability of police to conduct video surveillance in public places

By Elliott Goldstein

Q Is it legal for police to conduct video surveillance of public places?

A That depends on whom you ask. If you were to ask Federal Privacy Commissioner George Radwanski (hereinafter the "Commissioner"), the answer would be a definite "No!"

In fact, Radwanski was recently asked such a question by Information and Privacy Commissioner of British Columbia David Loukidellis, who complained regarding "the actual and proposed installation of [RCMP] surveillance cameras in the downtown core of the City of Kelowna, British Columbia." Specifically, the Commissioner was requested by Loukidellis to investigate the "lawfulness of this surveillance under the (federal) *Privacy Act* and its conformity with the privacy rights of Canadians."¹

The request was unusual because municipal police forces do not fall within the jurisdiction of the federal government or its commissioners. The RCMP is Canada's (excellent) federal police force. But in Kelowna, the RCMP serves as the municipal police force, so the Federal Privacy Commissioner does have jurisdiction.

The Commissioner investigated the complaint and established that "the RCMP installed one camera in the area of the Bennett Clock on Queensway Avenue in Kelowna." The monitored area is signed as follows: "This area of the City of Kelowna may be monitored by video surveillance for law enforcement purposes. For further information contact Kelowna RCMP (250) 762-3300. Information collected in accordance with the Federal Privacy Act." There are 11 signs posted in the area under surveillance.

The Commissioner also established that "at least five other locations have been selected for installation of sur-

veillance cameras as soon as funds become available, as part of a plan to eventually provide total coverage of all downtown streets and avenues in Kelowna. While the camera already installed was purchased with funds provided by the City and the Downtown Kelowna Association, it is operated and maintained solely by the RCMP. At the time of the complaint, the camera recorded video only on a continuous basis, 24 hours a day, seven days a week. The videotapes were changed daily and retained for a six-month period unless used for an administrative purpose, in which case any tape so used is to be retained for at least two years. The City of Kelowna hired four watch commander assistants to work for the RCMP Detachment and monitor the cameras and perform other duties for the RCMP. These assistants recorded the date and times the videotapes were changed as well as unusual happenings, if observed. There is no review made of the tapes after they are recorded unless there is a need to do so, for example after an incident is subsequently reported to police."

ESTABLISHING A CONTRAVENTION

Having established these facts, the Commissioner then reviewed the applicable federal legislation, namely the *Privacy Act*,² which defines personal information as any "information about an identifiable individual that is recorded in any form." Videotapes recorded by surveillance cameras fall within this definition, says the Commissioner, for the following reasons:

(a) An individual caught within the visual range of a video surveillance camera can, in theory, be identified.

(b) The captured image reveals information about the individual (such as the individual's whereabouts and behaviour).

(c) When the picture is recorded, there is a collection of personal information within the meaning of the Act.

The Commissioner then pointed to section 4 of the *Privacy Act*, which says: "No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution."

The Commissioner conceded that prevention and deterrence of crime could be regarded as an operating program or activity of the RCMP in its capacity as Kelowna's police force. But, in his opinion, "...it does not follow that monitoring and recording the activities of vast numbers of law-abiding citizens as they go about their day-to-day lives is a legitimate part of any such operating program or activity. This type of wholesale monitoring or recording certainly runs afoul of the requirement to collect only the minimum amount of personal information required for the intended purpose."

DETECTION AS JUSTIFICATION

In the view of the Federal Privacy Commissioner, "police forces cannot invoke crime prevention or deterrence to justify monitoring and recording on film the activities of large numbers of the general public."

But what about crime detection as a justification? The Commissioner never considered that issue. Surely, recording persons committing a criminal act would assist in their identification. It could be argued that continuous recording would enable the RCMP to record those criminal acts that occur in a short period of time without advanced warning.

This argument did not impress the Commissioner, however, who stated that "by recording continuously, as opposed to recording only selective incidents related to law enforcement activities, the RCMP was unnecessarily collecting information on thousands of innocent citizens engaged in

activities irrelevant to the mandate of the RCMP.”

Therefore, the Commissioner made a finding that the video surveillance in Kelowna that was the subject of the complaint was in contravention of the *Privacy Act*. The Commissioner concluded that this sort of video surveillance (that is, continuous recording) is unacceptable from the point of view of privacy rights.

On or about September 10, 2001, the Federal Privacy Commissioner received a letter from the Commissioner of the RCMP informing him that continuous video recording of the surveillance camera was terminated on August 28, 2001. The RCMP Commissioner explicitly alluded to the possibility that the Kelowna RCMP Detachment may decide to resume continuous random videotaping in the future. The RCMP Commissioner stated that, at present, the area under surveillance would only be videotaped in the event a violation of the law is detected.

The Commissioner conceded that “this puts the present use of the surveillance camera into compliance with the letter of the *Privacy Act*, which applies only to information ‘that is recorded in any form.’”

Nevertheless, the Commissioner was not satisfied that a continuation of the video camera surveillance without continuous recording is sufficiently respectful of the spirit of the privacy law nor of the privacy rights of Canadians. In his view, only outright removal of the camera would meet that standard.

FORMING AN OPINION

The Commissioner acknowledged that he was aware of the argument that “there is, in any event, no reasonable expectation of privacy in a public place. Certainly, it would not be reasonable to expect privacy where there are signs posted warning that we are under video surveillance.” He dismisses this argument in a rather strange way, however, by arguing that the focus should be on rights, not expectations, as follows:

“But while ‘reasonable expectation of privacy’ is a specific legal term, what is far more important is the right to privacy. That fundamental human right cannot be extinguished simply

by informing people that it is being violated. This is particularly true in the case of public space such as streets. People may have the choice of refusing to enter a store if there are signs warning that they are subject to video surveillance. But if there is a proliferation of surveillance cameras in our

Act, and although the *Privacy Act* itself does not provide sufficient protection against video surveillance without continuous recording, it is very much my hope that these observations may be of some help in contributing to an informed public opinion, which in the final analysis is always our strongest

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public streets, short of levitating above those cameras, people will have no way of withholding consent and still getting from place to place.”

The Commissioner is of the opinion that people have a right to privacy in a public place. In fact, he states that “in those public places, we retain the privacy right of being ‘lost in the crowd,’ of going about our business without being systematically observed or monitored, particularly by the state.”

It is respectfully submitted by this author that the Federal Privacy Commissioner is confusing anonymity with privacy. If one commits acts in plain view of the public, is one entitled to claim his or her right to privacy is being invaded if other members of the public watch?

If that person’s activities are seen by a bystander who may be called to testify in court and describe what he or she saw, why can that bystander not videotape or photograph those activities? Why should it make any difference that the bystander is a police officer? One of the advantages of video surveillance is that it permits security and enforcement officers to “visually” isolate persons within a large crowd and identify those who are perpetrating crimes.

The Commissioner concluded his investigation with this comment:

“The level and quality of privacy in our country risks being struck a crippling, irreparable blow if we allow ourselves to become subjected to constant, unrelenting surveillance and observation through the lens of proliferating video cameras controlled by the police or any other agents of the state. Although most police forces are outside the purview of the federal *Privacy*

defence against ill-considered violations of our rights.”

Apparently, the Commissioner was unable to convince the RCMP Commissioner, or the Federal Solicitor General, to stop the video surveillance. As a result, he has launched a lawsuit to declare the RCMP’s video surveillance activities in Kelowna unconstitutional as a violation of the *Canadian Charter of Rights and Freedoms* and international covenants.³

While this lawsuit may generate more work for lawyers – which is not necessarily a bad thing – I am of the opinion that federal government money could be more wisely spent fighting crime than fighting the RCMP. I’m with the Mounties. How about you? 🍁

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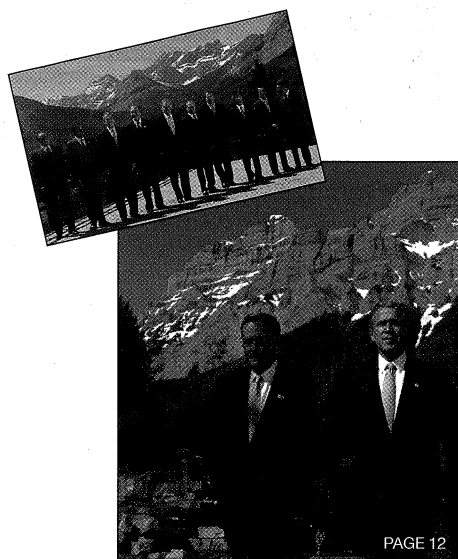
Author’s Notes

1 All quotations, unless otherwise indicated, are from the news release entitled “Privacy Commissioner releases finding on video surveillance by RCMP in Kelowna” (Ottawa, October 4, 2001), found at the Web site of the Federal Privacy Commissioner at www.privcom.gc.ca.

2 The *Privacy Act*, 1980-81-82-83, c. 111. The purpose of this Act is to extend the present laws of Canada that both protect the privacy of individuals with respect to personal information about themselves that is held by a government institution, and provide individuals with a right of access to that information.

3 “Privacy Commissioner Launches Charter Challenge, Ottawa, June 21, 2002” found at www.privcom.gc.ca.

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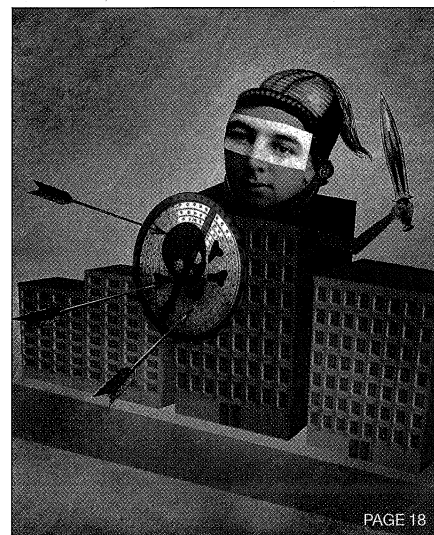
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